

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Washington, D.C.

In the Matter of:

KEVIN GRAY,

Respondent.

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Docket No. 11-3690-DB

DEBARRING OFFICIAL'S DETERMINATION

INTRODUCTION

By Notice of Proposed Debarment dated October 26, 2010 ("Notice"), the Department of Housing and Urban Development ("HUD") notified Respondent KEVIN GRAY that HUD was proposing his debarment from future participation in procurement and nonprocurement transactions as a participant or principal with HUD and throughout the Executive Branch of the Federal Government for a three-year period from the date of the final determination of this action. The Notice further advised Respondent that his proposed debarment was in accordance with the procedures set forth in 2 CFR parts 180 and 2424. In addition, the Notice informed Respondent that his proposed debarment was based upon his conviction in the Court of Common Pleas of Franklin County, Ohio for violation of Section 2913.51 of the Ohio Revised Code (Receiving Stolen Property). Respondent pleaded guilty and was convicted and sentenced to a two-year term of Community Control and fined \$3,000.00 with \$2,500.00 suspended.

A telephonic hearing on Respondent's proposed debarment was held in Washington, D.C. on April 5, 2011, before the Debarring Official's Designee, Mortimer F. Coward. Respondent appeared *pro se*. Sherece M. Tolbert, Esq. appeared on behalf of HUD. The record closed on April 30, 2011.

Summary

I have decided, pursuant to 2 CFR part 180, to debar Respondent from future participation in procurement and nonprocurement transactions, as a participant, principal, or contractor with HUD and throughout the Executive Branch of the Federal Government, for a period of three years from the date of this Determination. My decision is based on the administrative record in this matter, which includes the following information:

1. The Notice of Proposed Debarment dated October 26, 2010.
2. Respondent's Response to Notice of Proposed Debarment dated November 29, 2010 (received by HUD on December 6, 2010, postmarked November 30, 2010).
3. A copy of the Entry of Guilty Plea executed by Respondent and filed in the Court of Common Pleas, Franklin County, Ohio, Criminal Division on February 23, 2010, recording Respondent's guilty plea to the offense of receiving stolen property.
4. Respondent's Additional Submission in Opposition to Three-Year Debarment received by HUD on March 21, 2011 (including exhibits thereto).
5. Respondent's Closing Brief in Opposition of Three-Year Debarment received by HUD on April 12, 2011.
6. The Government's Brief in Support of Three-Year Debarment filed February 14, 2011 (including all exhibits and attachments thereto).
7. The Government's Technical Correction to its Support Brief filed February 15, 2011.
8. The Government's Motion to Strike Last Five Pages of Exhibit 1 [of its Pre-Hearing Brief] filed March 21, 2011.¹
9. The Government's Post-Hearing Brief in Support of Three-Year Debarment filed April 29, 2011 (including all exhibits and attachments thereto).

Government Counsel's Arguments

Government counsel recites that, during the period February 2007 to July 2007, Respondent participated in a property flipping scheme which resulted in Respondent's indictment on one count of engaging in a pattern of corrupt activity, one count of theft, two counts of money laundering, and six counts of receiving stolen property. In February 2010, Respondent pleaded guilty to and was convicted of two counts of receiving stolen property. Respondent was sentenced to two years of Community Control under basic supervision and ordered to pay a fine of \$3,000.00, of which \$2,500.00 was suspended.

Counsel summarizes some of the debarment regulations and case law that she considers as applicable in this case. In this regard, counsel notes that Respondent was a landlord in the Section 8 housing voucher program,² thus he was a "participant and principal in a covered transaction within the meaning of the Debarment regulations and, therefore, is subject to debarment," citing 2 C.F.R. §§ 2424.995(g) and (r) and 2 C.F.R. § 180.995. Counsel further notes that present involvement of a landlord in a HUD program is not a prerequisite for debarment if the landlord may reasonably be expected to be involved in a covered transaction. *See* 2 C.F.R. §§ 180.120(a), 180.200, and 180.970.

¹ Respondent did not file a response to the motion, but at the hearing he objected to having the pages stricken from the exhibit. The Debarring Official's Designee ruled in favor of the government. Respondent argued that the pages should not be stricken because the government relied on them in bringing the debarment action. As is evident, the five pages represent an OIG synopsis of the investigation and indictment in the criminal proceeding against Respondent and his codefendants. The memo indicates that it ensures "compliance with the region's requirement to submit follow-up judicial documentation to the Departmental Enforcement Center." The memo in no way is prejudicial to Respondent's case. In any event, its inadvertent inclusion, as suggested by the government, made it just as readily available to Respondent to the extent it could be helpful in his case. The memo played no part in today's decision.

² *See* Government's Brief in Support of three-Year Debarment, Ex. 6.

Respondent's receipt of stolen property, counsel adds, involved the sale or purchase of property among private parties. "Therefore, Respondent's conviction for a criminal offense committed while performing a private agreement or transaction is cause for debarment pursuant to 2 C.F.R. § 180.800(a)(1)." Respondent is further subject to exclusion under 2 C.F.R. § 180.800(a)(3), which expressly lists the offense of receiving stolen property as a cause for debarment. Counsel also posits that Respondent is subject to debarment under 2 C.F.R. 180.800(a)(4) because his "criminal offenses reflect poorly on his character and demonstrate Respondent's serious lack of business honesty and present responsibility."

Counsel next reviews the mitigating and aggravating factors under 2 CFR § 180.860 as they apply to Respondent's actions. Counsel argues that there is no evidence that Respondent did not receive financial gain from his wrongdoing. The Government suffered harm, however, to the extent of the expenses it incurred in investigating and prosecuting Respondent. Additionally, Respondent's wrongdoing compromised the integrity of the mortgage lending process. Further, because of Respondent's actions, lenders were misled into approving loans they otherwise would have rejected. The criminal scheme in which Respondent was involved lasted for three years. Respondent's involvement, which spanned a five-month period, required, according to counsel, "careful thought, preparation, and knowledge of a criminal act (i.e., theft offense)." Counsel argues Respondent knew when he received the properties involved in the "criminal matter [that they] were stolen." Respondent's "purchase and sale of stolen real property" was a critical part of the criminal enterprise to "(i) illegally purchase, sell, or possess property; (ii) deprive owners of property; and (iii) cause people by deception to execute promissory notes and mortgages." Counsel further notes that there is no evidence that Respondent has accepted responsibility for his wrongdoing nor recognizes the seriousness of his misconduct. Counsel states that Respondent's assertion that (i) he had no intent to deceive the lending institutions that were the victims of his wrongdoing; (ii) he was deceived by others; and (iii) he paid the court fine are not mitigating factors. Additionally, according to Government counsel, there is no evidence that Respondent cooperated with, or brought his offense to the attention of, any government entity before criminal proceedings were brought against him. Counsel also argues that, because Respondent was employed as a HUD Office of Inspector General auditor, "it is unlikely that Respondent was not aware of the import of his actions." Finally, counsel discounts as mitigation factors Respondent's claim that he complied with all HUD requirements while he was a Section 8 landlord and that he has complied with the terms of his probation. Compliance with court requirements, counsel observes, "does not establish that Respondent is presently responsible."

Counsel concludes that Respondent should be debarred for a three-year period to protect the Department, the government at large, and the public.

Respondent's Arguments

Respondent states that he began investing in real estate on the advice of a boyhood friend who was a licensed real estate broker. Respondent claims that because of his inexperience in real estate investment, he relied on his boyhood friend for guidance. During the time that the properties at issue in the criminal proceeding were being purchased, Respondent's friend provided funds to make repairs to the properties. The

repairs were made and the remaining proceeds were used to pay the mortgages and utility bills. Respondent contends he did not gain financially from the transactions, a fact, he says, the court acknowledged by not requiring him to make restitution. Respondent argues that the information he provided to secure a mortgage on each of the five properties he purchased was accurate. According to Respondent, he was unaware that the appraisals were inflated and that the proceeds from the sale of the properties at issue were being paid to shell companies. It was never his intent, Respondent says, to deceive lenders and steal money.

Respondent challenges the government's allegation that his actions resulted in harm to the government, and supports his challenge by citing an October 19, 2010, Departmental Enforcement Center memo on this issue that states "HUD REALIZED NO LOSS" (emphasis in original). Respondent takes issue with the government's allegation that he was involved in a criminal scheme which required careful thought, preparation, and knowledge. Respondent argues that the count in the indictment that alleged his participation in the scheme was dismissed. According to Respondent, at "no time did [he] knowingly participate in a scheme to defraud lenders" and he did not plead guilty to such a charge. Respondent asserts that "[r]eceiving stolen property is not an admission to involvement in a criminal scheme, theft or money laundering, or intentional deception. . . . What [he] pled guilty to was receiving funds, which were stolen and not stolen by [him], AND PRESENTED TO [him] UNDER FALSE PRETENSES. . . . [He] did not know at the time [he] received these funds they were stolen."³

Respondent offers as further mitigating factors for the Debarring Official's consideration, his acceptance of "responsibility by pleading guilty to receiving stolen property," his payment of court costs, and his early release from probation. Respondent argues that mitigating factors such as admission of wrongdoing, remorse, and "current responsibility" should be considered as reasons to reconsider debarment. As Respondent sees it, he is put "in the ultimate Catch 22." The government, Respondent contends, alleges that he is not presently responsible because he "does not admit his wrongdoing, then reasons that [he] should admit to crimes for which he was not guilty." Respondent adds that if he "were to admit to intentional involvement in an overall scheme to defraud lenders, which [he] did not, it would show remorse and simultaneously be cause for debarment, and demonstrate lack of present responsibility."⁴

Respondent admits that cause for his debarment exists under 2 C.F.R. § 180.800, but argues that "existence of a cause for debarment does not automatically require imposition of debarment. Conviction of a crime without intent should not be automatic cause for debarment." If this were so, Respondent argues, it would make the mitigating factors and the opportunity for Respondents to present their side "meaningless to these proceedings," and result in a mockery of due process.⁵

Respondent concludes by admitting that he "made a mistake in judgment by trusting friends" and becoming unintentionally involved in their fraudulent scheme. Respondent argues that he has paid a considerable price for his mistake and has learnt a

³ Respondent's Submission in Opposition to Three-Year Debarment at 2.

⁴ Respondent's Closing Brief in Opposition to Three-Year Debarment at 3.

⁵ *Id.*

very valuable lesson. According to Respondent, he is involved in his community and has no intention to get involved in real estate activities, and has shown "excellent potential for rehabilitation." For these and the other reasons discussed in his submissions, Respondent requests that he not be debarred.

Findings of Fact

1. Respondent was an assignee of a Housing Choice Voucher contract with the Columbus Metropolitan Housing Authority (CMHA) of Ohio, a recipient of HUD funds.
2. Respondent was a participant in the Section 8 program, receiving funding from CMHA for the rental of one of his properties.
3. Respondent was an investor along with a dozen codefendants in a fraudulent property flipping scheme.
4. Respondent was indicted on eight counts including money laundering, theft, engaging in a pattern of corrupt activity, and receiving stolen property.
5. Respondent pleaded guilty and was convicted on two counts of receiving stolen property.
6. Respondent was sentenced to two years of probation and fined \$3,000.00, \$2,500.00 of which was suspended.
7. Respondent expressed remorse for his criminal conduct.

Conclusions

Based on the above Findings of Fact, I have made the following conclusions:

1. As a recipient of Section 8 funds, Respondent was a participant in a covered transaction. *See* 2 CFR §§ 180.200 and 180.980.
2. As a principal in a covered transaction, Respondent is subject to HUD's debarment regulations. *See* 2 CFR §§ 180.120 and 180.150..
3. Respondent's criminal conviction serves as the basis for his debarment.
4. Pursuant to 2 CFR 180.800(a)(3), a conviction for receiving stolen property provides cause for debarment.
5. Respondent's conviction for receiving stolen property inherently calls into question Respondent's business honesty and business integrity and casts serious doubt on his present responsibility.
6. Respondent cannot collaterally attack his conviction and his arguments are irrelevant in this proceeding. *See, e.g., In the Matter of Frank Moscato*, HUDBCA No.94-A-127-26, 1994 HUD BCA Lexis 8 (August 1, 1994). *See also, In the Matter of Richard Scarborough*, HUDBCA NO. 90-4885-D5, 1990 HUD BCA Lexis 4 (February 13, 1990) and *In the matter of Robert F. Hayter*, HUDBCA No. 82-697-D25, 1983 HUD BCA LEXIS 19 (March 23, 1983). In *Hayter*, it was held that "[S]ince it is axiomatic that [the administrative judge is] without authority to consider any challenge to the validity of the conviction itself, . . . it [is] inappropriate and futile to consider contentions in mitigation to the extent that their acceptance would

be necessarily premised upon impeachment of the validity of [Respondent's] conviction."

7. The Government has met its burden of demonstrating that cause exists for Respondent's debarment based on Respondent's conviction. *See* 2 CFR 180.850 and 855.
8. Respondent provided no specific evidence or facts to support his claim that he is presently responsible.
9. Pursuant to 2 CFR § 180.860, the following factors were considered in determining whether Respondent should be debarred and, if so, the length of the debarment:
Mitigating Factors - -
 - a. There is no evidence in the record that Respondent had a pattern or prior history of wrongdoing.
 - b. Respondent has accepted responsibility for his wrongdoing and recognizes the seriousness of the misconduct that led to his proposed debarment.
 - c. Respondent paid the court costs associated with his criminal matter.Aggravating factors - -
 - a. Respondent's wrongdoing had the potential to compromise the mortgage lending process and the operations of the lending institutions victimized by the fraudulent scheme.
 - b. Respondent's participation in the scheme occurred over an almost two-year period and by his own admission involved the purchase of five different properties.⁶
 - c. Respondent played a role in carrying out the wrongdoing.
 - d. Respondent's early release from probation, without more, is not a cognizable mitigating factor in a debarment proceeding.
 - e. The mitigating factors advanced by Respondent are not sufficiently compelling when viewed against the seriousness of Respondent's misconduct to justify dismissal or the imposition of a minimal period of debarment. *See* 2 C.F.R. § 180.865.
10. HUD has a responsibility to protect the public interest and take appropriate measures against participants whose actions may affect the integrity of its programs.
11. HUD cannot effectively discharge its responsibility and duty to the public if participants in its programs or programs that it funds fail to act with honest and integrity.

⁶ *See* Respondent's Additional Submission in Opposition to Three-Year Debarment at 1.

DETERMINATION

Based on the foregoing, including the Findings of Fact, Conclusions, and the administrative record, I have determined, in accordance with 2 CFR 180.870(b)(2)(i) through (b)(2)(iv), to debar Respondent for a three-year period from the date of this Determination. Respondent's "debarment is effective for covered transactions and contracts that are subject to the Federal Acquisition Regulation (48 CFR chapter 1), throughout the executive branch of the Federal Government unless an agency head or an authorized designee grants an exception."

Dated: _____

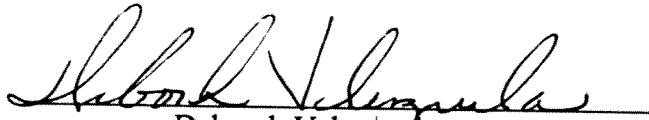
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Craig T. Clemmensen
Debarring Official

CERTIFICATE OF SERVICE

I hereby certify that on this 13TH day of June 2011, a true copy of the
DEBARRING OFFICIAL'S DETERMINATION was served in the manner indicated.



Deborah Valenzuela
Debarment Docket Clerk

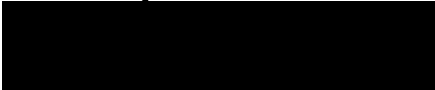
HAND-CARRIED

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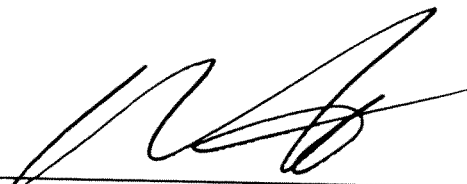


CONCURRENCE:

In the Matter of:

KEVIN GRAY – DOCKET NO. 11-3690-DB

Dated: June 17th 11



Mortimer F. Coward
Debarring Official's Designee